Gratiot Community Hospital *and* Gratiot Community Hospital Registered Nurses Association. Case 7–CA–32107

October 18, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 14, 1992, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel and the Respondent filed exceptions and briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

[1] The Respondent's brief in support of exceptions raises the defense that the issues in this proceeding should be deferred to the parties' contractual grievance-arbitration procedures. The Respondent has not previously raised this defense in its answer to the complaint or in argument before the judge. Accordingly, we find that the deferral issue has not been timely and properly raised at this stage of the proceeding. See, e.g., *Long Island Nursing Home*, 297 NLRB 47 fn. 1 (1989).

[2] The judge found that some of the nursing supervisors were statutory employees. We do not reach that issue. For, even assuming arguendo that all the nursing supervisors were statutory supervisors, the unilateral changes regarding them would nonetheless be unlawful. In this regard, we note that the parties have agreed to include all nursing supervisors in the unit, and they were covered by a contract at the time of the changes here. We have held that when parties to a collective-bargaining relationship, as here, have voluntarily agreed to include supervisors in a unit, the Board will order the application of the terms of the collective-bargaining agreement to those supervisors. *Union Plaza Hotel & Casino*, 296 NLRB 918 fn. 4 (1989), enfd. sub nom. *E.G. & H. Inc. v. NLRB*, 949 F.2d 276 (9th Cir. 1991), citing *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980).

We perceive no basis for departing from this rule here, despite the contract's recognition clause which excludes ''supervisors within the meaning of the National Labor Relations Act.'' Although the Respondent could not be compelled to recognize the Union as the representative of a unit containing supervisors, the Respondent certainly could, and did, agree to a contract that covered certain individuals found to be supervisors. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 fn. 2 (1961).

In light of the foregoing, we find the changes regarding the nursing supervisors to be unlawful. In addition, we modify the judge's recommended Order to include a make-whole remedy for all ''nursing supervisors,'' including those found by the judge to be statutory supervisors. We note that art. 37 of the contract specifically provides wage rates for the nursing supervisor classification in the wage and salary schedule.

Member Raudabaugh does not necessarily agree with those Board decisions which hold that an employer violates Sec. 8(a)(5) by making changes, during the contract, concerning in-unit statutory supervisors. However, in the instant case, the change had a significant impact on in-unit statutory employees. More particularly, as a consequence of the elimination of the position of nursing supervisor, statutory supervisors ''bumped'' and displaced unit employees. In these circumstances, Member Raudabaugh agrees that the change was unlawful. He does not reach the question of whether there would be a violation in the absence of a demonstrable and actual impact on unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gratiot Community Hospital, Alma, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(b) and (c).

''(b) Bargain with the RNA, on request, regarding its decisions, and the effects of those decisions, to cease providing surgical scrub uniforms, to eliminate the nurse supervisor classification, and to eliminate the 7/70 shift program, for employees in the following appropriate unit:

> ''All full-time and regular part-time Registered Nurses employed by Respondent, but excluding irregular part-time nurses, student employees, all other employees, Health Education Coordinator, Infection Control Coordinator, the Director of Nursing, Assistant Directors of Nursing, and all other supervisors within the meaning of the National Labor Relations Act.

''(c) Make whole those registered nurses who were directly and indirectly affected, for any loss of earnings and other benefits they may have suffered as a result of its unlawful conduct in ceasing to supply surgical scrub uniforms, eliminating the Nursing Supervisor classification, and terminating the 7/70 shift program.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Gratiot Community Hospital Registered Nurses Association as the exclusive bargaining representative for our employees in the following appropriate unit:

> All full-time and regular part-time Registered Nurses employed by us, but excluding irregular part-time nurses, student employees, all other employees, Health Education Coordinator, Infection Control Coordinator, the Director of Nursing, As-

sistant Directors of Nursing, and all other supervisors within the meaning of the National Labor Relations Act.

WE WILL NOT refuse to bargain with the Union about our decisions, and the effects of those decisions to (a) discontinue the provision of surgical scrub uniforms to registered nurses, (b) eliminate the nurse supervisor classification, (c) terminate the 7/70 shift program, and (d) layoff employees affected by the unilateral decisions outlined in clauses (b) and (c) of this paragraph.

WE WILL NOT coerce employees to meet with members of management without the presence of a representative of the Union in order to discuss or attempt to resolve grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request by the Union, rescind all unilateral changes and reinstate the wages, hours, job classifications, and other terms and conditions of employment, including the provision of surgical scrub uniforms, that were in effect prior to our taking unlawful, unilateral action.

WE WILL, on request of the Union, bargain about our decisions, and the effects of those decisions, to discontinue the provision of laundered surgical scrub uniforms to registered nurses, to abolish the nursing supervisor classification, and to terminate the 7/70 shift schedule.

WE WILL make whole all those nurses who were affected directly or indirectly, for any loss of earnings and other benefits suffered as a result of our unlawful conduct in unilaterally discontinuing the provision of laundered scrub uniforms, eliminating the nursing supervisor classification, and terminating the 7/70 shift schedule.

GRATIOT COMMUNITY HOSPITAL

Richard F. Czubaj, Esq., for the General Counsel.[1]
Mark D. Nelson, Esq. (Keck, Mahin & Cate), of Chicago, Illinois, for the Respondent.
James E. Hayes, Esq., of Mount Pleasant, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Based on unfair labor practice charges filed by the Gratiot Community Hospital Registered Nurses Association (the RNA) on July 22, 1991,[2] as amended on August 20, a complaint issued on September 5 alleging that Respondent, Gratiot Community Hospital, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying the commission of any unfair labor practices.

At the trial held in this case on February 10 and 11, 1992, in Alma, Michigan, all parties were afforded full opportunity to examine and cross-examine witnesses. On the entire record,[3] including my observation of the demeanor of the witnesses, and with due consideration of the parties' posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that Respondent is and has been at all times material a Michigan corporation with its office and principal place of business located in Alma, Michigan, where it operates an acute health care hospital. Based on Respondent's admissions, I find that Gratiot Community Hospital is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Similarly, I find that the Charging Party, RNA, is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The pleadings in this case give rise to the following issues:

1. Whether Respondent's vice president of human resources, Dennis Witham, insisted that a unit employee, Linda Cox, discuss her pending grievance with him without the presence of a union representative, thereby interfering with her exercise of Section 7 rights and undermining the status of the Union.

2. Whether Respondent unilaterally terminated a practice of providing scrub uniforms to registered nurses without bargaining with the RNA.

3. Whether Respondent unilaterally altered terms and conditions of employment by eliminating nursing supervisor positions.

4. Whether Respondent unilaterally altered the registered nurses' terms and conditions of employment without bargaining with the RNA by terminating a scheduling option referred to as the 7/70 shift.

B. *The Cox Grievance*

Since 1967, registered nurses at the Gratiot Community Hospital have been represented by the RNA and covered by successive collective-bargaining agreements. The contract in effect at the time the events in this case occurred was effective from September 8, 1990, to September 8, 1992.

Pursuant to the terms of the contract, Linda Cox, a registered nurse assigned to the home care unit, initially lodged a verbal grievance with her superior, a unit coordinator, protesting the Hospital's failure to pay her for the costs of driving between her home office in Alma and a satellite facility

[1] Hereinafter counsel will be referred to as the General Counsel.
[2] Hereinafter all events took place in 1991, unless otherwise indicated.
[3] Exhibits introduced into evidence by the General Counsel will be cited as G.C. Exh. followed by the exhibit number; the Respondent's exhibits will be cited as R. Exh. The transcript will be referred to as Tr. followed by the appropriate page number.

in another community, according to longstanding practice. On July 12, after her first-step grievance was denied, she filed a written grievance with Respondent's vice president for human resources, Dennis Witham. Witham, who was relatively new on the job, asked Cox where the matter was covered in the contract. She explained that it was a matter of practice rather than a contractual requirement. Witham assured her that there would be a second-step meeting at which she could have union representation.

According to Cox, Witham telephoned her on July 15 and asked her to meet with him to work out a solution to her grievance. When she told him she would prefer not to meet unless a union representative accompanied her, he remarked that there should be a step between the grievance filing and a second-step meeting with union representation. Cox said she again declined to meet privately with him, at which point he repeated two or three times in increasingly loud and insistent tones that they could settle the matter without a union agent there. Cox then reminded him of his assurance that she could have a representative with her at a second-step meeting, and flatly said she would not meet him until Hayes, the Union's representative, was present.

By letter dated July 22, Hayes wrote to Witham to schedule a step 2 meeting regarding the Cox grievance, or alternatively, to delay such a meeting until the unfair labor practice charge which the Union had filed about the matter was resolved. Hayes took the opportunity to advise Witham that Cox had reported both to him and to the RNA executive committee that she felt ''intimidated and/or bewildered'' by his asking her to point out the section of the contract that had been violated and then telling ''her that it was not necessary to have a representative at the Step Two meeting'' from which ''she concluded that your reaction to her insistence on representation was negative.''(R. Exh. 1.)

Witham presented an altogether different version of his July 15 conversation with Cox. He maintained that he telephoned Cox solely to obtain information about her grievance since he could find no specific contractual reference for compensating nurses for their traveling time. He stated that he did not reject her renewed request for union representation; rather, he purportedly told her that a representative was unnecessary at that point since he was simply investigating the underlaying facts so that he could respond to the grievance.

In fact, after this phone conversation, no second-step meeting took place. Instead, the Union filed unfair labor practice charges on July 22, which inter alia, faulted Witham for insisting that employees participate in second-step grievance meetings without union representation. Subsequently, Hayes and Witham met and discussed this and other matters, and in October, Witham resolved the grievance in Cox's favor.

C. *Respondent's Alleged Unilateral Acts*

1. Respondent reacts to a fiscal crisis

In the spring of 1991, the Hospital determined that it was sustaining severe financial losses. Deficits of several million dollars were reported for both 1990 and 1991, and a $3-million loss was projected for 1992. Consequently, Respondent initiated an intensive review of its operations in order to identify ways in which it could function more economically. As part of this review process, a ''turnaround'' task force was formed whose members included Witham, Vice President of Operations Carol Goffnet, and Director of Nursing Susan Deland. The task force was directed to develop a recovery plan which would be submitted for approval to the Hospital's board of directors on August 7. In carrying out its mission, the turnaround team devised and implemented cost-saving measures which affected virtually every employee in the Hospital. However, this case addresses only those unilateral changes which affected the terms and conditions of employment of registered nurses.

2. Initial meetings between the parties

During a June 26 meeting, management officials informed the RNA executive committee and the Union's bargaining agent, Jim Hayes, about the Hospital's financial predicament and the likelihood that layoffs of bargaining unit members would be necessary.

The parties met again on July 17 at which time Respondent's acting chief financial officer provided the RNA representatives with additional information about the Hospital's financial status. The Union also was advised that 23 ''full-time equivalent'' registered nurse positions probably would be eliminated. However, management indicated that if the Union would forgo the 8-percent wage rate increase due to be implemented on September 16, the number of layoffs could be reduced to 11. Respondent then presented the Union with a written proposal to freeze wages at their current levels until the contract expired in September 1992.

The parties next met on July 30 at which time the Union responded to the Respondent's July 17 proposal by presenting a draft which suggested a deferral of the 8-percent pay raise, to be recaptured at a later time. The RNA also produced a letter addressed to Respondent's interim president, listing 10 cost-cutting ideas such as reducing the number of vacation days. Witham testified that management concluded that the RNA suggestions were unacceptable. The parties met once again on August 5 with many of the Union's rank-and-file members present, but nothing was accomplished.

Although the Respondent had presented the Union with financial data to support its claims of financial distress, at no time did any Hospital official divulge the specific recommendations of the recovery plan until it was adopted by the board of directors on August 7. Then, on August 8, Respondent made the terms of the plan public for the first time, posting charts and distributing a letter from the Hospital's president to all employees describing the steps to be taken and even taking some preliminary measures to begin implementation. Three of the plan's provisions which directly affected the terms and conditions of employment of the RNA's members are discussed below.

3. Respondent abolishes its scrub uniform policy

For many years, Respondent voluntarily purchased and laundered scrub uniforms for most of the Hospital staff, including the registered nurses. However, on July 22, Respondent's interim president, Gene Miyamoto, issued a report to the employees announcing that, among other cost-saving

measures, ''the Hospital will no longer furnish surgical scrub suits'' to employees in most departments. (R. Exh. 4 at 2.)[4]

The next day, July 23, Respondent's vice president of support services, expanded on the president's announcement in a memo distributed to all departments. The memo stated in pertinent part that:

> Effective September 1 . . . the Hospital will no longer supply employees with surgical scrubs as a replacement for uniforms. The policy change affects all departments. . . .
>
> Employees . . . who currently utilize scrubs will have the option of purchasing the scrubs currently provided, or purchase appropriate uniforms from outside vendors. The Hospital will be selling its current supply of scrubs. . . .
>
> It will be the employees' responsibility to launder their own scrubs effective September 1. [G.C. Exh. 3.]

RNA President Glenn King testified that he never was officially notified by Respondent of its decision to terminate the scrub policy and did not even see the July 23 memo until sometime early in August when it was posted on a Hospital bulletin board. King further maintained that the Union raised the scrub situation while the executive committee was meeting with management on other matters. He claimed that some member of management told the Union that the decision regarding the scrubs was nonnegotiable. However, both Witham and Goffnet denied having taken such a position.

4. Respondent eliminates nursing supervisor positions

a. *The duties of the nursing supervisor*

Another aspect of Respondent's recovery plan involved reorganizing the nursing staff. The plan entailed eliminating the position of nursing supervisor, reassigning persons holding that title to staff RN positions, merging the functions of the nursing supervisor and unit coordinator and assigning them to a new supervisory position titled ''unit managers'' on the day shift and ''shift managers'' on the later shifts. The nursing supervisors had long been regarded as members of the RNA bargaining unit, and were specifically covered in the wage and salary schedule set forth in article 37 of the collective-bargaining agreement. Nevertheless, Respondent reevaluated their status and concluded that they were supervisors as defined in the National Labor Relations Act. Therefore, Respondent believed that it was within its prerogative to abolish their positions.

Former Nursing Supervisor Patricia Modders, a government witness, served as a nursing supervisor for 20 of her 24 years with the Hospital, the last 3 of which were full time, until her position was abolished on September 1. She was one of two nursing supervisors on the day shift, with responsibility for approximately 30 employees in all units of the nursing department which included registered nurses, licensed practical nurses, nurses aides, and ward clerks. In terms of the chain of command, she reported to a unit coordinator and the director of nursing. Modders estimated that she spent 50 percent of her time providing direct patient care when she would relieve other nurses during their break periods. The balance of her time was devoted to the administrative functions required of a nursing supervisor. In this regard, she explained that one of her principal duties was to ensure that a sufficient number of nurses was assigned to each unit, a task she felt required little independent judgment since a computer program was in place which calculated what the staffing levels should be based on estimates of each patient's acuity.[5] If Modders determined that more or less nurses were needed in a particular unit than were projected by the computer, she had the authority to increase or decrease the number of nurses assigned, but would have to prepare a written justification for doing so. In altering the staffing levels, she first would seek off-duty volunteers, but if none was available, she either asked the least senior nurse to work an extra shift, or transferred nurses from one unit to another based upon their skills and expertise. She also had the authority to excuse nurses who needed to leave before their shift ended.

Modders further testified that she had no role in resolving grievances other than to serve as a conduit, transmitting employee grievances to the unit coordinator or director of nursing and relaying their responses to the affected employee. If instructed to do so by the director of nursing, she would verbally counsel employees, which is the first step in the grievance procedure set forth in the RNA collective-bargaining agreement. Modders acknowledged that she filled out incident reports, required when any untoward event occurred, and submitted them to the unit coordinator. Other than noting whether she thought the matter involved a serious infraction, she did not propose that discipline be imposed upon the employee responsible for the incident. However, RNs also filled out incident reports which they submitted to the nursing supervisor.

Modders ceased evaluating employees 7 years ago when the unit coordinator's position was coordinated. However, she continued to communicate her views orally to the coordinator as to the nurses' performance. She did not hire or fire, nor did she contribute to those decisions. She attended meetings with just the unit coordinator and director of nursing, but did not participate in other management meetings. Modders' description of her duties as a nursing supervisor were generally confirmed by another registered nurse, Iola Radtke, who served as a nursing supervisor only 1 day a week until that position was abolished.[6]

JoAn LaClair, a nursing supervisor for 14 years prior to being promoted to the position of nursing manager, offered a vastly different image of her former position than did Modders. She estimated that she allocated 75 percent of her time to administrative duties and only 25 percent to patient care. Like Modders, she was responsible for staffing decisions, including transferring staff to other units. In making transfer decisions, LaClair stated that she was obliged to apply and interpret contractual terms for employees under other collective-bargaining agreements. She also testified without controversion that she implemented any discipline

[4] Respondent stated it would continue to supply scrub suits to personnel in several departments as required by the Center for Disease Control.

[5] Respondent uses the word acuity to refer to a patient's ability to take care of his or her own needs.

[6] Radtke indicated that she had the right to discipline employees through the verbal reprimand stage, but never exercised that authority.

that might be necessary, and occasionally issued written warnings.

LaClair also was involved in the hiring process. From four to six times a year, the personnel department scheduled interviews for her with applicants who were were seeking positions on her shift. Subsequently, she forwarded her recommendations to those who made the final decisions. She thought that the other nursing supervisors had similar authority if they chose to exercise it. She also participated in decisions to terminate employees. Moreover, at the unit coordinator's request, she contributed both orally and in writing to employee evaluations.

Operations Vice President Goffnet confirmed LaClair's testimony asserting that nursing supervisors reported to the director of nursing, had the authority to discipline employees, contribute to evaluations of probationary employees, and recommend candidates for employment. However, she conceded that her direct knowledge of the nursing supervisor's duties was based on her former experience as director of nursing 7 years earlier.

b. *Respondent allows nursing supervisors to bump into bargaining unit positions*

On August 7, the Hospital's board of directors approved the recovery plan developed by the turnaround task force, including a proposal to eliminate the nursing supervisor positions. Witham explained that the task force formulated this proposal in part to offset the cost of the RNs' 8-percent payraise. Further, he acknowledged that it was his interpretation of the collective-bargaining agreement which led the task force to conclude that the nursing supervisor was a management position. Specifically, he relied on two provisions in the contract: the recognition clause which excludes supervisors, and article 28, section 3, which accords a managerial role to the shift supervisor in the first step of the grievance procedure.[7] He recognized that article 37 of the contract included an hourly wage rate for nursing supervisors, but offered no explanation for their anomalous inclusion in the agreement.

On August 8, Witham sent a form letter to all employees who management believed would be affected by various planned staffing changes, including the nursing supervisors, advising them that they would be laid off from their current positions as of August 31. The letter also informed the recipients that they might be able to exercise their seniority rights to bump into other positions.

Subsequently, the nursing supervisors received another letter from the director of nursing assuring them they would not be laid off; instead, they would be permitted to exercise their seniority rights to bump into a bargaining unit position. Accordingly, over a 3-day period beginning August 12, management arranged a series of meetings in which RNs met in groups of 10 starting with those having accumulated the most seniority, to select new positions in the bargaining unit. Witham maintained that in allowing the nursing supervisors and others to bump into bargaining unit positions, Respondent was complying with article 24 of the labor contract which provides that ''Any employee who is displaced . . . may choose to exercise seniority rights insofar as the provisions of this Article allow'' as long as the employee is ''fully capable of performing all required duties effectively.'' (G.C. Exh. 4 at 14.) The article then sets forth a schedule in which the employees with the least seniority are laid off first.

5. Respondent reduces the 7/70 shift staff to zero

In 1981, as a means of attracting registered nurses to night shift assignments, the Hospital negotiated with and obtained the Union's consent to a new staffing procedure which provided that each member of a paired team of RNs would work a full 7-day week for a 10-hour shift from 10 p.m. to 8 a.m., while receiving pay for 80 hours, at 1.19 times more than the regular hourly rate. The experiment began with just one team of nurses, and although there has been some fluctuation, the number of teams increased steadily. Prior to the adoption of the recovery plan, there were 13 teams.

As Carol Goffnett pointed out, the parties' collective-bargaining agreement gave the director of nursing express authority to ''decide the number of assignments and the work areas that will be under the Seventy Hour Shift'' (G.C. Exh. 4 at 43). Relying on this language, and without notifying or conferring with the Union about their proposal, the turnaround team obtained the board of director's approval to reduce the number of 7/70 teams to zero. The 26 RNs affected by this reduction were given layoff notices on August 8. Like the nursing supervisors, they, too, were permitted to bump into other positions; numerous employees were displaced in the process.

Respondent soon determined that it needed to reinstitute the 7/70 program and invited bidding for places in two teams.

III. DISCUSSION AND CONCLUDING FINDINGS

A. *Respondent Violated Section 8(a)(1) and (5) in its Handling of the Cox Grievance*

A resolution of the legal issues related to the Cox grievance starts with an evaluation of the witnesses' credibility. After carefully scrutinizing the record, I find reason to believe that Cox rather than Witham offered the more credible account of their telephone conversation. In reaching this conclusion, I rely heavily on the fact that Cox reported her distressed reaction to Witham's remarks almost immediately to Hayes and the executive committee, as the union agent's July 22 letter to Witham demonstrates. In that letter, Hayes specifically referred to Cox's assertion that Witham advised her she could do without union representation. Yet, Witham failed to protest or dissent from this accusation until he testified at the instant hearing. I also was impressed by Cox's adamant testimony that Witham repeatedly insisted that they could settle the matter without a union representative present. Witham's explanation for his telephone call to Cox also leaves something to be desired. If he wished to determine what the contractual basis was for the grievance, Goffnet was a more authoritative source of information than was Cox.

The next question is whether Witham's comments to Cox violated Section 8(a)(5) and (1) of the Act. In badgering Cox to meet with him alone to settle her grievance, Witham dis-

[7] The recognition clause describes the bargaining unit as

> All Full time and regular part time Registered Nurses employed by Gratiot Community Hospital, but excluding . . . the Director of Nursing . . . and all other supervisors within the meaning of the . . . Act. [G.C. Exh. 4 at 1.]

regarded the express terms of the parties' labor agreement which provided that a member of the bargaining unit was entitled to representation at a step 2 meeting. In so doing, Witham attempted to bypass the employees' statutory representative. Such conduct unquestionably violates Respondent's obligations under Section 8(a)(5) of the Act. *Heck's, Inc*., 293 NLRB 1111, 1118–1119 (1989); *Weinreb Management*, 292 NLRB 428, 432 (1989). Indeed, a representative's right not to be bypassed in such circumstances is explicitly protected by the proviso to Section 9(a) of the Act, which states:

> . . . any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Further, by insisting that he and Cox could settle the grievance without the intervention of a union representative, Witham conveyed the impression that if she failed to comply, the matter would not be resolved in her favor. Coming from a high-ranking management official, such behavior is particularly coercive and violates Section 8(a)(1) of the Act. *Weinreb Management*, supra.

B. *The Unilateral Termination of the Scrub Practice was Unlawful*

It is undisputed that the Hospital furnished and laundered surgical scrub uniforms for the RNs free of charge for a longer period of time than any witnesses at the hearing could recall. However, the parties never formalized this practice in their successive collective-bargaining agreements and there is no evidence that they even raised it in any of their negotiations. Nevertheless, by virtue of long custom, the provision of scrub uniforms to the RNs became an employment benefit and, thus, a mandatory subject of bargaining. *Owens-Corning Fiberglass Corp*., 282 NLRB 609 (1987).

An employer is not relieved of the duty to bargain in good faith about revising or eliminating a practice such as the one at issue here even though it is not embodied as an express term of its labor agreement. *Dearborn Country Club*, 298 NLRB 915 (1990), *Owens-Corning Fiberglass Corp*., supra. Thus, the Respondent was required to give the Union notice of its intent to rescind the scrub uniform policy and an opportunity to bargain about it.

Here, Respondent contends that the Union had the requisite notice but the RNA waived its right to negotiate about the matter by failing to request bargaining. Respondent's contentions lack merit on several grounds.

First, Respondent failed to notify the Union in a manner which might suggest that it had an intent to enter into good-faith bargaining. When the Respondent announced its decision regarding the scrubs in a July 22 letter to all employees, it stated that the Hospital ''will no longer furnish surgical scrub suits. . . . Employees will, however, be able to purchase these at reduced prices. This will result in cost savings of $13,000.'' (R. Exh. 4 at 2.) The Respondent's second message regarding the changed policy was in a July 23 memo from Respondent's vice president of support services to all departments which read: ''the policy regarding hospital-supplied surgical scrubs has changed. Effective September 1 . . . the Hospital will no longer supply employees with surgical scrubs.'' (G.C. Exh. 3.)

Neither of these communication suggests that the notice was of a tentative or preliminary proposal. Rather, each was a pronouncement of a final and unqualified decision. Even worse, by directing the letters to the employees and then, to departments, the Respondent again bypassed the Union, as it had in the Cox matter, sending a strong signal that the RNA had no effective role to play in Respondent's predetermined process.

Even assuming that the Respondent's communications to employees was sufficient to afford the Union indirect notice of the revised scrub policy, it was not notice which gave the RNA the opportunity to make a meaningful response. Here, by announcing its new scrub policy as if the decision was already cast in stone, and by conveying that decision to the employees rather than to their certified bargaining representative, the Respondent exposed its disinterest in genuine bargaining. Given these circumstances, the RNA was not required to go through the motions of requesting bargaining, for the Board does not require futile gestures. See *Michigan Ladder Co*., 286 NLRB 21 (1987).

Furthermore, I am persuaded that the RNA executive committee did raise the scrub issue while it was meeting with management officials about other issues and was told in some manner that the matter was not open for discussion. It may be that Witham and Goffnet did not use the precise term, ''non-negotiable,'' but rather employed some other expression which conveyed the same message. I am convinced that the Union would not neglect to raise this issue while it was engaged in discussions with the Respondent about other elements of the recovery plan. If the RNA representatives believed that the Respondent was willing to bargain about this matter, surely they would not have added the changed scrub policy to the other pending unfair labor practice charges as early as August 20. It also bears noting that Respondent rejected without explanation, each of the Union's proposals regarding the reduction of costs and staff. Consequently, there is no reason to assume that the Hospital treated the Union's interest in bargaining about the scrub policy with any greater consideration.

C. *Respondent Unlawfully Eliminated the Nursing Supervisor Classification*

As detailed in the fact statement, Respondent abolished the position of nursing supervisor as another cost-saving device, claiming that because the job involved duties which fell within the statutory definition of supervisor, the Hospital was absolved of any duty to bargain. The General Counsel argues that the nursing supervisor's tasks were of a routine nature and required little independent judgment; therefore, they were members of the bargaining unit whose jobs could not be terminated unilaterally. Alternatively, the General Counsel submits that even if persons holding the title of nursing supervisor performed certain managerial functions, Respondent was not permitted to eliminate the classification during the contract's term after having treated the position as if it were within the bargaining unit for over two decades. Thus, the

threshold question here is whether the nursing supervisors were members of the bargaining unit rather than supervisors under the Act, and even if they were statutory supervisors, was Respondent required to treat them as if they were unit employees? If the answer to either of the foregoing questions is yes, the next question is whether Respondent could unilaterally terminate those positions.

1. The question of the nursing supervisors' supervisory status

a. *Applicable principles*

Section 2(2) of the Act provides that a supervisor applies to:

> any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving that the foregoing definition applies to a given position rests Respondent as the party asserting that status. *Ohio Masonic Home, Inc*., 295 NLRB 390, 393 (1989). However, the Respondent is not required to show that nursing supervisors meet all the criteria listed in Section 2(2). Proof that the employee fulfills any one of the enumerated factors may suffice. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). However, in the area of nursing, the Board has ''carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which . . . is incidental to the professional's treatment of patients . . . .'' as distinguished from those who exercise supervisory authority in the interest of the employer. *Beverly Home Convalescent Centers*, 264 NLRB 966, 967 (1982) (quoting S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974)).

b. *Application of principles to the facts of this case*

The evidence in this case reveals that some, but not all nursing supervisors come within the statutory definition of ''supervisor.'' Although the witnesses testifying about this matter for the Government and the Respondent were equally credible, their testimony indicates that they did not possess the same authority. LaClair's testimony indicates she had broad authority. In contrast, Modders' and Radtke's testimony established that their roles were far more limited.

Although it is difficult to draw generalizations about the nursing supervisors' role, the record shows that there were certain categories of work which all three witnesses performed (albeit, with varying levels of responsibility); namely, arranging staffing levels, handling first-stage grievances, disciplining, and evaluating employees. These functions will be examined next to determine whether they involved supervisory authority.

(1) Staffing decision required little independent judgment

There is no question that nursing supervisors were responsible for staffing decisions; that is, they verified that a sufficient number of employees had been allocated for the current shift and determined how many employees were needed in each unit to properly care for patients during the next shift. According to Modders, this task was fairly routine since the number of attendants was determined by a computer program. In fact, Radtke indicated that on weekdays, the nursing office took care of most of the staffing work.

However, it is undisputed that the nursing supervisors frequently deviated from the computer generated figures, adding or reducing the number of aides and nurses, based on their knowledge of how ill the patients were. This staffing functions involved two sorts of decisions: first, the nursing supervisors had to decide how many aides, licensed practical nurses, or RNs were needed on each unit, a responsibility which clearly entailed the exercise of independent judgment.[8] However, that judgment was informed by the nursing supervisors' technical and professional experience as to how patients' needs could best be served.[9] Hence, this responsibility was related more to the duty to provide patient care than to the employer's managerial and administrative interests. *Beverly Manor Convalescent Centers*, supra at 967.

The second stage of the nursing supervisor's staffing authority was to decide which employees should be shifted from one unit to another, requested to work overtime, or sent home if not needed. This function required little independent judgment for these matters were decided according to seniority.[10] Thus, the staffing function did not require the nursing supervisor to perform duties consonant with those of a supervisor under the Act.

(2) Nursing supervisors had differing roles in dispensing discipline

According to Modders, the nursing supervisor's role in the disciplinary process was confined to preparing incident reports and delivering verbal counseling. Modders conceded that she would include a recommendation for disciplinary action where appropriate, but then would forward the report to the unit coordinator who would handle the matter thereafter. No evidence was adduced as to whether or not her recommendation had any effect on the outcome. Moreover, all registered nurses could submit incident reports, and, therefore, Modders had no special authority in this regard. LaClair, on the other hand, not only prepared incident reports

[8] The nursing supervisors' judgments about staffing levels were subject to review, for they were required to justify in writing any deviations from the computer projections.

[9] Both Modders and LaClair had extensive experience; Modders had served as a nursing supervisor for 20 years; LaClair for 17.

[10] Former Nursing Supervisor LaClair asserted that she was required to interpret collective-bargaining agreements pertaining to other bargaining units when making staffing decisions. However, while such contracts were not offered into evidence, it is fair to assume that transfers or layoffs of employees in other units was controlled by seniority provisions comparable to those in the RNA's agreement. Consequently, the extent to which LaClair might have to construe other labor agreements was probably minimal.

but disciplined the employee involved in the incident as well, without clearance from a higher authority. No evidence was adduced, however, that the incident reports were part of a progressive disciplinary system.

Modders also was authorized to counsel employees verbally for disciplinary purposes. ''Verbal counseling,'' a term referred to in article 7 of the parties' collective-bargaining agreement, was a preliminary step which preceded the initiation of more serious disciplinary action and led to no other consequences. (G.C. Exh. 4 at 4.) In such circumstances, it is well settled that ''merely issuing verbal reprimands is too minor a disciplinary function'' to confer supervisory authority. *Passavant Health Center*, 284 NLRB 887, 889 (1987).

Article 7 of the agreement also provided for more serious, progressive disciplinary action and required that a written report issue before any penalty was imposed. In the event an employee received a second disciplinary report, the labor contract authorized ''the unit coordinator/shift supervisor and/or Director of Nursing or designee'' to take ''appropriate disciplinary action.'' Id. While Modders never issued such written reports, LaClair did. The reason for this disparate approach to disciplinary matters in part may be a matter of temperament. It is far more likely, however, that the unit coordinator controlled such matters since she was on duty throughout Modder's shift, whereas LaClair worked without any higher ranking authority present, and thus, acted as the director of nursing's designee on the night shift, as permitted by the collective-bargaining agreement.

While the language of article 7 is hardly a model of clarity, it suggests that nursing supervisors were empowered to issue written warnings and recommend corrective action as part of a progressive disciplinary system.[11] However, the record does not reveal whether or not the nursing supervisor had the authority to independently impose a penalty, or whether others in the nursing hierarchy acted on the nursing supervisor's recommendations without independent investigation. In *Passavant*, supra at 890, the Board ruled that

> for the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

In the absence of probative evidence which meets the *Passavant* standards regarding the implications of LaClair's authority to issue written warnings, there is no basis to conclude that any nursing supervisor had the independent authority required of a statutory supervisory.

(3) Some nursing supervisors independently resolved grievances

The boundaries of the nursing supervisor's role in the grievance process are described in the parties' collective-bargaining agreement (G.C. Exh. 4 at 21):

> *Step One—Initiating a Grievance*—a nurse with a grievance shall first discuss the matter with the shift supervisor or unit coordinator for possible resolution. That nurse shall have the right to have an Association Representative present at such discussion. If discussion is held with the supervisor, that supervisor shall discuss the issue with the Director of Nursing or designee before giving official response.

In accordance with this provision, Modders merely served as a conduit, transmitting employee grievances to the director of nursing and then conveying the director's verbal response to the employee. It is uncontroverted that the nursing director invariably asked Modders if she had advised the unit coordinator of the grievance. It is obvious that Modders did not adjust or resolve grievances independently; even her limited role as a messenger was circumscribed by the nursing director who consistently asked Modders if she had reviewed the grievance with the unit coordinator before bringing it to her. Radtke played no role at all in the grievance process. On the night shift, however, LaClair delivered the ''official response'' without consulting the director of nursing. Again, LaClair's greater authority is explained by the fact that no higher officials were present at the Hospital during the late night hours. Consequently, LaClair filled a vacuum as the nursing director's designee, as role permitted by the parties' collective-bargaining agreement. Nothing in that agreement prevented the Hospital from conferring similar authority on nursing supervisors during the day shift. However, as a matter of practice, Respondent did not do so since the unit coordinators and the director of nursing were on present during such times.

(4) The evaluation process

Variances also were evident in the degree to which day shift and night-shift nursing supervisors contributed to evaluations of other employees. Modders explained that the unit coordinators wrote the evaluations for the employees on her units and might, on occasion, ask for her opinion. As the only person in authority on the night shift, LaClair provided written evaluations of probationary employees. While no evidence was presented which might establish the weight accorded to LaClair's evaluations, it is fair to infer that they were influential since she was the only person to have first-hand knowledge of their individual performance.

(5) Conclusion regarding the status of nursing supervisors

The General Counsel submits that LaClair was an anomaly who usurped authority to which she was not entitled. The record disproves counsel's contention, for LaClair testified without dispute that she was specifically asked to perform certain duties such as providing written evaluations of certain employees and interviewing applicants for employment on the night shift, after which she provided the human resources department with a written recommendation as to the applicant's hire or nonhire. LaClair was aware that at least one other night shift nursing supervisor also took part in the interview process, which supports the inference that other nursing supervisors on the night shift exercised authority similar to hers.

In addition, LaClair recommended that employees be fired, and on one occasion at least, carried out her recommendation by personally discharging a worker in the presence of a unit

[11] Since art. 7 implies that a shift supervisor has the authority to issue a second disciplinary report, it is reasonable to infer that the supervisor is similarly empowered to write a first report as well.

coordinator.[12] No evidence was presented to suggest that management ever told her she was over-reaching. Accordingly, based on LaClair's credible and uncontroverted testimony, it is fair to infer that supervisors who worked on shifts when they were the highest ranking officials present, performed duties which involved independent judgment in such matters as grievance resolution, and the hiring and firing of employees. Accordingly, I conclude that Respondent has met its burden of proving that night-shift nursing supervisors were supervisors within the meaning of Section 2(2) of the Act.

The scope of the nursing supervisors' authority on the day shift was far more limited. The record indicates that this dichotomy developed in the mid-1980s, when the Hospital created the position of unit coordinator who assumed various managerial duties, including some which had been performed by the nursing supervisors. Having withdrawn some of the nursing supervisors' functions which would have qualified them as statutory supervisors, Respondent may not now claim that they are excluded from the protections of the Act.

In sum, I conclude that all nursing supervisors on the night shift (or other shifts) who exercised the same degree of authority as LaClair were supervisors pursuant to Section 2(2) of the Act, and that all former nursing supervisors on the day shift (or other shifts) who had no greater authority than Modders, were members of the bargaining unit.

2. Respondent unlawfully altered the scope of the unit

It is well settled that an employer may not unilaterally alter the scope of a bargaining unit during the term of a collective-bargaining agreement covering that unit. *Scott Corp.*, 296 NLRB 918 fn. 4 (1989), enfd. sub nom. *E.G. & H. v. NLRB*, 949 F.2d 276 (9th Cir. 1991); *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980). This is true even if the unit includes managerial or supervisory positions, for ''once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action.'' Id. at 1133.[13]

Here, Respondent has long recognized the registered nurses bargaining unit, including nursing supervisors, since the RNA's inception on or about 1967. While they are not expressly identified in the bargaining unit description, special wage rates for that classification are set forth in article 37 of the contract. Further, announcements of nursing supervisor vacancies were posted for bid and the positions filled by the bidder with the most seniority, pursuant to article 21 of the labor agreement.

Respondent could have objected to the inclusion of night-shift nursing supervisors in the bargaining unit during negotiations for any of the labor agreements entered into with the RNA over the past several decades. It did not do so. Indeed, at no time prior to August 8, when management abruptly announced the demise of the nursing supervisor classification, had any Hospital official objected to their inclusion in the agreement. Having voluntarily recognized a bargaining unit which included nursing supervisors, Respondent could not unilaterally abolish those positions during the term of the contract, even though some of them performed functions of statutory supervisors.

Respondent argues that nursing supervisors are not included in the unit by virtue of contractual language in the recognition clause which expressly excludes ''supervisors within the meaning of the National Labor Relations Act.'' (G.C. Exh. 4 at 1.) Respondent's argument is unconvincing; employees may be called supervisors, as were the day-shift supervisers here, and yet, perform no functions which match those of a supervisor as defined in Section 2(2). A title cannot convert an employee into a supervisor under the Act; rather, it is the nature of an individual's work and the degree of responsibility exercised which is dispositive of an employee's status.

Although the duties of the day-shift nursing supervisors were affected in the mid-1980s when the unit coordinator position was created, the role of the night-shift nursing supervisor who worked without a unit coordinator present, apparently remained the same. When the parties executed contracts, including the most recent one, management knew, or should have known, what duties were performed by each category of nurses. Consequently, the Respondent was not privileged to modify the scope of the bargaining unit by fiat during the contract's term, for, as the Board confirmed in *Arizona Electric*, to allow such a practice would undermine the stability of the collective-bargaining relationship. Id. at 1133.

D. *Respondent Unlawfully Laid Off the 7/70 Nurses*

The General Counsel submits that when the Respondent discontinued the 7/70 scheduling option, it unilaterally altered the wages, hours, and other conditions of employment of registered nurses who had opted for that schedule.

Since the nurses who had elected the 7/70 shift worked only 70 hours a week for 80 hours' pay, the Respondent's elimination of this scheduling option increased their hours of pay without a commensurate increase in wages. Furthermore, numerous other bargaining unit members were adversely affected when the former 7/70 RNs bumped into regularly scheduled jobs. In fact, some employees who were bumped into part-time positions as a result of this top-down putsch lost their entitlement to health benefits.

1. The Respondent's defenses lack merit

The Respondent defends its decision to eliminate the nursing supervisors classification and reduce the 7/70 teams to zero on two grounds. First, Respondent contends that the management-rights clause, which granted it the ''right to decide the number of employees, provided the authority to eliminate the nursing supervisors classification. As for the reduction of the 7/70 teams, Respondent points to article 46 of the labor contract as specifically conferring on it the right to ''decide the number of assignments.'' (G.C. Exh. 4 at 43.) Relying on *NRC Corp.*, 271 NLRB 1212 (1984), Respondent argues that the Board should not intervene here since its construction of the collective-bargaining agreement is arguably reasonable. Second, Respondent poses a waiver argument, contending that when the Union agreed to accept the management-rights clause and article 46, it waived its right to protest unilateral staffing decisions. For the reasons set forth

[12] It was undisputed that LaClair worked without a unit coordinator on the scene. The presence of a unit coordinator on this occasion was unexplained.

[13] This principle in no way bars an employer from challenging the inclusion of night-shift nursing supervisors in the bargaining unit once negotiations for a successor agreement have begun.

below, I conclude that the Respondent's arguments lack merit.

a. *Respondent did not have specific contractual authority to unilaterally eliminate the nursing supervisor classification*

In *NRC Corp*., supra, an employer relied on a contract provision governing transfers into and out of a district to unilaterally transfer work from one district to another. The General Counsel and the Union argued that a contract clause concerning the employer's right to consolidate, merge, or reorganize a district forbid the transfer. The Board ruled that where both parties had equally plausible interpretations of disputed provisions in their collective-bargaining agreement, the employer's allegedly unlawful conduct was based on a ''substantial claim of contractual privilege''; and that the dispute was solely one of contract interpretation, ''the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.'' (Citation omitted.) Id. at 213.

However, in *Johnson-Bateman Co*., 295 NLRB 180, 186 (1989), where the employer claimed that a management-rights clause legitimized the unilateral implementation of a drug/alcohol testing requirement, the Board distinguished *NRC Corp*., finding that:

> the express, general provisions of the Management Rights clause . . . do not provide the Respondent with a ''sound arguable basis'' for ascribing to that clause a specific privilege to implement unilaterally the drug/alcohol testing requirement.

In the instant case, *Johnson-Bateman* rather than *NRC Corp*. governs.[14] Here, the management-rights clause in the parties' labor contract, speaks in general terms of the Hospital's right ''to decide the number of employees.'' This language is simply too broad and nonspecific to provide the Respondent a '''sound arguable basis' for ascribing to that clause a specific privilege'' to abolish unilaterally a classification of bargaining unit employees. *Johnson-Bateman Co*., supra at 186.

It also should be noted that the collective-bargaining agreement states: ''The above defined Management Rights shall not be exercised in contravention of any express provision of the Agreement.'' (G.C. Exh. 4 at 3.) Although there is no contractual provision which expressly created the nursing supervisor positions, article 37 sets forth their separate rates of pay. When the Respondent eliminated the nursing supervisor category, it breached its duty to pay these nurses in accordance with their contractual wage rate, thereby contravening an ''express provision of the Agreement.'' This conflict between articles 5 and 37 further undermines Respondent's claim of contractual privilege.

b. *Article 46 does not authorize the layoff of 7/70 nurses*

Respondent also relies on the *NRC* case in arguing that its decision to reduce the 7/70 nursing teams to zero was a specifically reserved right. The difficulty with Respondent's argument is that it did not just decide on a given number of 7/70 assignments; it notified all 26 nurses who worked that schedule that they were laid off. Thus, what Respondent awkwardly styles a reduction in the number of assignments, a step which it never before had taken, was nothing less than an abolition of the 7/70 program.[15]

Article 46 covers four pages in the collective-bargaining agreement and sets forth in great detail terms and conditions of employment applicable to nurses on the 7/70 shift. However, it contains not one word about the program's termination. Having apparently paid considerable attention to negotiating this article, the parties surely would have referred to the manner in which it could be canceled, had that been their intention, particularly if the Hospital was assigned the right to decide that matter unilaterally. Article 46 also is silent as to layoffs. It is article 24 that controls this subject, setting forth in great detail the order in which layoffs were to occur, starting with nurses possessing the least seniority. However, nurses on the 7/70 shift were among those with the greatest seniority. Therefore, in laying off the 7/70 shift nurses first, Respondent ignored its obligations under article 24 the contract. Accordingly, I am not persuaded that Respondent has a sound arguable basis to find in article 46 a specific privilege to unilaterally eliminate the 7/70 program.

Accordingly, contrary to Respondent's contentions, I conclude that allegations that Respondent violated the Act by announcing unilaterally that the nursing supervisor and 7/70 shift positions would be eliminated is properly before me.

c. *The RNA did not waive its bargaining rights*

Like the employer in *Johnson-Bateman*, supra, Respondent argues that the RNA contractually waived its right to bargain about the unilateral elimination of nursing supervisor positions and the 7/70 program. The Board's treatment of this argument in *Johnson-Bateman* is wholly applicable here. In that case, the Board began its analysis by reciting well-settled law that

> the waiver of a statutory right will not be inferred from general contractual provisions, rather, such waivers must be clear and unmistakable. Accordingly, the Board has repeatedly held that generally worded management-rights clauses . . . will not be construed as waivers of statutory bargaining rights.

Id. at 184.[16] Particularly where an employer claims that right to make unilateral changes midterm, the contractual language alleged to sustain such a claim will be strictly construed. See *Westinghouse Electric Corp*., 278 NLRB 424, 434 (1986). Applying these principles to the matter before it, the Board

[14] Respondent also cites arts. 14(7), 15, and 16 of the labor agreement in support its argument that it had the right to unilaterally eliminate the nursing supervisor classification. These provisions are even more general than the disputed provision in the management-rights clause clause. Thus, they clearly do not lend themselves to ''equally plausible interpretations . . . .'' which might warrant the Board's withdrawal from this dispute. *NRC Corp*., supra at 1213.

[15] Sometime after the 7/70 program was terminated, Respondent reinstated it, choosing new members of two teams on the basis of bids. However, when Respondent announced that the shift would be abolished, it gave no hint that it might be restored. Thus, Respondent' resurrection of the 7/70 schedule was a separate, unilateral act.

[16] See also other cases cited in *Johnson-Bateman*, supra at 184–185.

then concluded that nothing in the parties' bargaining history showed that

> the meaning and implications of the management-rights clause in general or drug/alcohol testing in particular, were ''fully discussed and consciously explored'' during negotiations, or that the Union ''consciously yielded or clearly and unmistakably waived its interest'' in regard to bargaining about the drug/alcohol testing requirement. [Id.]

Similarly, no evidence was presented in this case that the parties discussed eliminating the nursing supervisor positions in the context of the management-rights clause, or the abolition of the 7/70 option as a management right under article 46. Indeed, there was no evidence that the parties discussed such matters at any time or in any context during contract negotiations. Accordingly, the Respondent's claims of contractual waiver are rejected.

2. The Respondent may not modify mandatory subjects of bargaining during the contract's term

Under Section 8(d) of the Act, wages, hours, and other terms and conditions of employment are mandatory subjects of bargaining. During the term of an agreement, an employer may not unilaterally change any provision which is a mandatory subject, absent the union's consent. To do so constitutes a per se refusal to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962).

In the case at bar, by eliminating nursing supervisor positions, Respondent unilaterally reduced the wages of the employees who held those jobs; by terminating the 7/70 program, Respondent unilaterally increased the number of hours worked by the nurses who worked such shifts without a commensurate increase in wages. These were significant changes in mandatory subjects which had a considerable impact on members of the bargaining unit in addition to those directly affected. Respondent was legally bound to notify the Union of any proposed changes and provide an opportunity to bargain. Instead, management remained close-mouthed about the actual terms of the recovery plan. The RNA learned about the changes only after the board of directors had endorsed the recovery plan and its provisions were announced to the Hospital staff at large. By bypassing the Union and communicating these significant changes directly to the employees, Respondent ''disparages the collective-bargaining process and improperly undermines the status of the Union as the designated and recognized collective-bargaining representative of the . . . employees.'' *Hecks, Inc*., 293 NLRB 1118 (1989).

Even if the Respondent had given proper notice of its proposals, the the Union had no obligation to request or engage in bargaining, much less consent to any modification of the extant agreement. In the absence of the Union's consent, ''[t]he unambiguous language of Section 8(d) of Act explicitly . . . forbade Respondent's midterm modification'' of the contract's job classification and wage scheme for day-shift nursing supervisors and the 7/70 scheduling program. *Oak Cliff-Golman Baking Co*., 207 NLRB 1063, 1064 (1973).

In sum, by failing to apprise the RNA of its recovery plans, announcing the details of the plan to the employees without giving prior notice to the Union, and unilaterally implementing its plans, Respondent exhibited a cavalier disregard of its contractual bargaining obligations in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Gratiot Community Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Gratiot Community Hospital Registered Nurses Association (RNA) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by (a) refusing to bargain collectively with the RNA over its decision and the effects of its decision to cease supplying laundered surgical scrub uniforms to all registered nurses; (b) to eliminate the nurse supervisor classification and notify registered nurses in such positions they were laid off, and (c) eliminate the 7/70 work schedule and notify nurses on that schedule that they were laid off.

4. Respondent violated Section 8(a)(1) and (5) by coercing an employee to meet with a management representative without the presence of a RNA representative to discuss or resolve a grievance.

5. The following employees constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Registered Nurses employed by Respondent, but excluding irregular part-time nurses, student employees, all other employees, Health Education Coordinator, Infection Control Coordinator, The Director of Nursing, Assistant Directors of Nursing, and all other supervisors within the meaning of the National Labor Relations Act.

6. The unfair labor practices outlined in paragraphs 3 and 4 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically the Respondent shall be directed, on request of the RNA, to rescind all unilateral changes and reinstate the wages, hours, job classifications, and other terms and conditions of employment, including the provision of surgical scrub uniforms, which were in effect prior to the time it implemented these changes. Respondent also shall be instructed to bargain with the RNA about its unilateral decisions, and the effects of those decisions, to end its practice of providing laundered surgical scrub uniforms to registered nurses, to eliminate the nurse supervisor classification insofar as it applied to registered nurses who worked when unit coordinators and the director of nursing were present, to terminate the 7/70 shift schedule, and to lay off any employees affected by its unilateral decisions.

Further, Respondent shall be instructed to make whole those employees who were directly and indirectly affected for any loss of earnings and other benefits suffered as a result of Respondent's unilateral conduct in eliminating the

7/70 shift option, the nurse supervisor classification, except for those nurse supervisors who worked with unit coordinators or the director of nursing present, and the scrub uniforms.

Lastly, Respondent shall be ordered to post the notice appended to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Gratiot Community Hospital, Alma, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Gratiot Community Hospital Registered Nurses Association over its decisions, and the effects of those decisions, (1) to cease supplying surgical scrub uniforms to the registered nurses; (2) to eliminate the nursing supervisor classification insofar as it applied to nursing supervisors who worked under the direct supervision of unit coordinators and the director of nursing; and (3) to terminate the 7/70 work schedule, and to lay off any employees affected by the decisions outlined in clauses (2) and (3) of this paragraph.

(b) Coercing employees to meet with management without a representative of the RNA present to discuss or resolve grievances.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the RNA, rescind all unilateral changes and reinstitute the wages, hours, job classification, and other terms and conditions of employment, including the provision of surgical scrub uniforms, that were in effect prior to its unlawful conduct.

(b) Bargain with the RNA, on request, regarding its decisions, and the effects of those decisions, to cease providing surgical scrub uniforms, to eliminate the nurse supervisor classification (except for those who worked without direct oversight from unit coordinators and the director of nursing), and to eliminate the 7/70 shift program, for employees in the following appropriate unit:

> All full-time and regular part-time Registered Nurses employed by Respondent, but excluding irregular part-time nurses, student employees, all other employees, Health Education Coordinator, Infection Control Coordinator, The Director of Nursing, Assistant Directors of Nursing, and all other supervisors within the meaning of the National Labor Relations Act.

(c) Make whole those registered nurses who were directly and indirectly affected, for any loss of earnings and other benefits they may have suffered as a result of its unlawful conduct in ceasing to supply surgical scrub uniforms, eliminating the nursing supervisor classification (except for those who worked without direct oversight from unit coordinators and the director of nursing), and terminating the 7/70 shift program.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of compensation due under the terms of this Order.

(e) Post at its place of business in Alma, Michigan, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''